IN THE

Supreme Court of the United States

October Term, 1939.

No. 68

WILLIAM HELIS,

Petitioner,

versus

MRS. ITASCA KINNEY WARD, as Executrix of the Estate of Bryan Ward, Deceased, et al.,

Respondents.

PETITION FOR REHEARING

and

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

EUGENE D. SAUNDERS,
Counsel for Petitioner.

LLOYD J. COBB,
Of Counsel.

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PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

Comes now William Helis, petitioner herein, and presents this, his petition, for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

That this court erred in holding that the judgment of the Circuit Court of Appeals was predicated upon evidence which was without objection admitted at the trial.

II.

That this court erred in holding that the right of petitioner to attack the report of the umpire was a distinct and different ground of relief which petitioner failed to preserve or urge in his application to this court.

III.

That this court erred in holding that the attack by petitioner upon the umpire's report is an afterthought entitled to no consideration.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals be, upon further consideration, reversed.

Respectfully submitted,

EUGENE D. SAUNDERS,
Counsel for Petitioner.

LLOYD J. COBB,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, Eugene D. Saunders, counsel for the above named, William Helis, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EUGENE D. SAUNDERS.

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WILLIAM HELIS,

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MRS. ITASCA KINNEY WARD, as Executrix of the Estate of Bryan Ward, Deceased, et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

The judgment rendered herein by your Honors is predicated upon three conclusions, viz.: (1) petitioner's complaint that the judgment of the Circuit Court of Appeals was founded on a theory not tried in the District Court and as to which all evidence had been excluded by the trial court is unjustified because the decision is predicated upon facts recited in the report of an umpire which was without objection admitted at the trial; (2) the right of petitioner to attack the report of the umpire was a distinct and different ground of relief which petitioner failed to preserve or urge in his application to this court;

and (3) petitioner's attack upon the umpire's report is an afterthought and hence does not support the complaint of a lack of due process of law.

We most earnestly, but respectfully, submit that your Honors have erred to the very great prejudice of petitioner upon each of these points.

JUDGMENT OF CIRCUIT COURT OF APPEALS IS NOT SUPPORTED BY ANY EVIDENCE ADMITTED WITHOUT OBJECTION.

In petitioner's application for this writ he stated the ground therefor as follows, p. 5:

> "The decision of said Court of Appeals in directing the rendering of judgment on a theory which was not tried in the District Court and as to which all evidence was excluded by the trial judge so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

The writ was granted on this ground, limited to the question of whether a new trial should have been ordered.

Your Honors have found this ground of complaint to be unjustified because after the Circuit Court of Appeals determined that the contract between the litigants required the determination of the open flow capacity of the well

> "* * * It then turned to the record and ascertained that Massey, the umpire, appointed pursuant to the

agreement of the parties, had found that by using the 3/8-inch choke as a base and 'building up therefrom by using other chokes to determine pressures and conditions' the well was capable of producing much in excess of three thousand barrels of oil per day. Since that calculation by Massey was consistent with the Circuit Court of Appeals' interpretation of the formula in the contract, that court concluded that petitioner was liable to pay the higher amount provided in the contract, $400,000.00. * * *"

Your Honors have further said:

"* * * The production of the well was tested by the umpire in the manner provided in the contract and the results of that test were without objection admitted at the trial. Complete establishment of the facts necessary for application of the formula was thus made in the manner provided by the parties in their contract."

Your Honors have fallen into an error of fact in stating that the results of the test made by Massey "were without objection admitted at the trial." Massey did not testify and his written report (R. 208) is a part of the transcript only because of having been annexed as an exhibit to the original petition filed by petitioner (Tr. p. 8). It was never offered in evidence by either of the litigants and hence comprises no part of the evidence submitted by them for the determination of their controversy.

Had the report of Massey been offered in evidence by respondents and had petitioner failed to object thereto we could understand that petitioner might now find himself bound by everything contained in that report, notwith-

standing the ruling of the District Court specifically excluding all other evidence tending to show the open flow capacity of the well. We most earnestly submit, however, that this petitioner cannot be bound by everything contained in a report which was never formally offered in evidence and as to which he was never afforded the opportunity to object. Particularly can he not be bound by such a report when he has by his pleadings shown that he would have assailed it (R. 8, 9) had it been used by his opponents.

Neither petitioner nor respondents contended that the report of Massey was that of an umpire whose decision was binding upon them and determinative of their differences. Respondents, in their pleadings, merely alleged that they stood ready to prove that the well was "capable of producing, within the terms and specifications of said contract, an amount greatly in excess of 3000 barrels of oil per day" (R. p. 66). Upon the trial of the case respondents sought to prove their contentions by the testimony of their employee, Buck, but the trial court maintained petitioner's objection to Buck giving any testimony to support the contentions of respondents. Respondents neither pleaded nor relied upon the report of Massey. So much so that they did not even offer that report in evidence. Petitioner, while annexing a copy of Massey's report to his petition, specifically assailed it as the report of an umpire (R. 8, 9) and the record affirmatively shows that petitioner did not offer it in evidence (R. 135).

In view of the foregoing facts we most respectfully submit that your Honors have erred in holding that the

report of Massey was admitted without objection upon the trial and that the Circuit Court of Appeals was justified in predicating its judgment upon statements contained therein.

RIGHT TO ATTACK REPORT OF UMPIRE IS NOT A DISTINCT GROUND OF RELIEF WHICH PETITIONER DID NOT PRESERVE OR URGE IN APPLICATION FOR THIS WRIT.

Your Honors have found that the right of petitioner to attack the umpire's report is a separate ground of relief and not embraced in his complaint that he has been deprived of his day in court. We submit that this conclusion is erroneous although a natural consequence of your finding that evidence had been admitted without objection which supported the judgment of the Circuit Court of Appeals.

The record in this case shows beyond any possibility of a doubt that the appellate court has rendered judgment on a theory never litigated by the parties. It is entirely clear that neither of the parties was permitted by the trial court to introduce any evidence to support a judgment on that theory. It is equally and absolutely certain that the theory of the Circuit Court of Appeals cannot be applied to the record as presently composed with the slightest assurance of accomplishing justice between the parties.

Notwithstanding the foregoing we recognize that litigation must proceed according to certain rules and that

petitioner would be in no position to complain of the injustice of the procedure followed in this case if any act of his or his counsel is responsible therefor. If petitioner had permitted the report of Massey to be filed in evidence without objection he would have known that there was evidence in the record which might support an adverse decision. In such event petitioner would have been required to complain that there had not been a full and fair trial of the new issue; not that there had been no trial whatever. He might have been required to specifically request that he be afforded the opportunity to introduce evidence in support of the allegations of his petition (R. 8, 9) attacking the umpire's report.

What actually occurred, however, was that petitioner specifically attacked the umpire's report in his petition and, in connection with these allegations, attached a copy of the report to his petition. Respondents never even referred to this report in their pleadings. They did not produce Massey as a witness and they did not offer his report in evidence. Their failure to offer the report in evidence was no oversight because counsel for respondents specifically asked counsel for petitioner if counsel for petitioner was offering any correspondence from Massey and though answered in the negative (R. 135) counsel for respondents made no effort to do so.

Under these circumstances, we submit, petitioner was fully justified in believing and acting upon the supposition that he was fully protected by the ruling of the trial court excluding all evidence as to the open flow capacity of the well. There having been no trial of that issue and no

evidence introduced relative thereto there could not be any judgment rendered thereon.

Your Honors have said that petitioner should have requested the remand of the case to permit him to attack the umpire's report and that having failed so to do and not having requested this writ on that ground he has lost any right he may have had. But, we most earnestly submit, your Honors are in error on this point. Petitioner had to found his complaint on the error actually made by the court which was the deciding of the case upon a theory urged but not tried in the court below and upon evidence not filed and relied upon by the parties. When this error was directed to the court's attention it might have either concluded that the judgment should be affirmed for want of evidence to support a reversal or that the case should be remanded for further trial. The only important point at this time is that petitioner did complain of the error actually committed by the court and has, on the ground of that same error, applied for redress to this court.

Persons may contract that an umpire shall be designated to settle a particular controversy which may arise in the future. If, however, both are dissatisfied with the decision of the umpire and neither sees fit to rely upon it their controversy would be determined upon the basis of the evidence which each presented to the court. So, in the instant case. Petitioner disavowed the umpire's report in his initial pleading. Respondents, for reasons which they evidently considered sufficient, did not plead the umpire's decision as determinative of the controversy and undertook to maintain their contentions by other evidence

which was excluded by the trial court. Neither litigant offered the umpire's report in evidence.

If petitioner had requested that the case be remanded to enable him to attack the umpire's report he would necessarily have consented to the judgment being predicated solely upon a report which neither he nor his opponents had been willing to accept and which neither had offered in evidence. He would thereby have rectified the very error which had caused his injury and would no longer have been in a position to urge that he had been deprived of his day in court.

We submit that petitioner did all that could possibly have been expected of him when he directed the attention of the appellate court to the fact that its decision was predicated upon facts not contained in the record. It was then incumbent upon the Circuit Court of Appeals to either render such judgment as was justified by the facts contained in the record or to remand the case to permit the taking of evidence upon any points which it regarded as necessary for the decision of the case.

PETITIONER IS NOT URGING AFTERTHOUGHT.

Your Honors have said that petitioner presents an afterthought when he urges that the report of the umpire is subject to attack. We respectfully submit that the record is conclusive proof of the contrary.

In his initial pleading petitioner attacked this report (R. 8, 9) in anticipation of its being offered and relied upon by respondents. When respondents did not see fit to use the report it was unnecessary for petitioner to follow up these allegations with proof of the errors rendering this report worthless. Had this report become an issue in the case petitioner was prepared with allegation and proof to show its complete worthlessness.

It is true that petitioner did not, in his application for rehearing, specifically request an opportunity to attack the umpire's report. This was not done for the reason hereinabove set forth, that petitioner did not believe that his defense should be so limited. He believed that his rights consisted in having the court follow the customary procedure of either deciding the case upon the then existing record or remanding the case for retrial under the theory established by the appellate court.

In a serious effort to follow the rules established by your Honors petitioner eliminated from his application for this writ everything not essential to the presentation of the single issue which he sought to raise. He did not think it necessary to impose upon your Honors the burden of considering the nature of his defense. He believed that your interest would be confined to the fact that he had been deprived of any opportunity, through no fault of his, to present any defense, without regard to the nature or merit thereof.

In conclusion we most respectfully submit that your Honors should in this case apply the rule enunciated by

you in the case of *Duke Power Co. v. Greenwood County*, 229 U. S. 259, wherein you said, p. 268:

> "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented."

No harm could possibly result from requiring that this case be remanded for a new trial. Grave injustice may and will result if there is permitted to become executory a judgment which is founded on an unlitigated theory and predicated solely upon an umpire's report which neither litigant regarded as worthy of being offered in evidence.

For the foregoing reasons we respectfully request that a rehearing herein be granted and that after further consideration the case be ordered remanded to the District Court for further trial.

Respectfully submitted,
EUGENE D. SAUNDERS,
Counsel for Petitioner.

LLOYD J. COBB,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 68.—October Term, 1939.

William Helis, Petitioner,
vs.
Mrs. Itasca Kinney Ward, as Executrix of the Estate of Bryan Ward, Deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 18, 1939.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit for specific performance of a contract to purchase a mineral lease brought by respondents, as vendors. The contract price was to be determined pursuant to a formula based upon the production of certain designated wells on the property. That price was fixed at $300,000 "if the average daily production of said wells for a period of fifteen days after completion is less than 3,000 barrels each, calculated on a 3/8-inch choke according to the methods usually employed in gauging the capacity of oil wells." In case the production, calculated in that manner, was more than 3,000 barrels per day, the purchase price was fixed at $400,000. The test was to be made jointly by a representative of respondents and a representative of petitioner; and "in the event they fail to agree on the proper gauge", it was provided that "Judge Hardin . . . will appoint a reputable engineer to act as umpire."

The parties failed to agree on the proper gauge and Judge Hardin appointed W. L. Massey, a petroleum engineer, to make the test.[1] Massey conducted a test and submitted a written report, which without objection was admitted at the trial. That report stated that although "the well will not make 3,000 barrels per day on such 3/8" choke", it was "capable of flowing merchantable oil at a rate much in excess of 3,000 barrels of oil per day on an open flow, or through any choke larger than a 5/8" choke." At the trial there was other testimony that the production "through a 3/8-inch

[1] Judge Hardin instructed Massey: "You are requested to determine, first, the actual production of three-eights (3/8) choke; second, by using the three-eights (3/8) choke you are to calculate the open flow capacity of the well."

choke" was not more than 3,000 barrels a day. The trial court held that the contract meant that the well was to be flowed through a 3/8-inch choke. Accordingly it dismissed the bill, since on that interpretation it was clear that the production was not more than 3,000 barrels a day and since petitioner already had paid $300,000. On appeal, the Circuit Court of Appeals held that the test provided in the contract "was not to measure the production through a 3/8-inch choke, but to calculate on a 3/8-inch choke the amount the well was capable of producing." It then turned to the record and ascertained that Massey, the umpire appointed pursuant to the agreement of the parties, had found that by using the 3/8-inch choke as a base and "building up therefrom by using other chokes to determine pressures and conditions" the well was capable of producing much in excess of 3,000 barrels of oil per day. Since that calculation by Massey was consistent with the Circuit Court of Appeals' interpretation of the formula in the contract, that court concluded that petitioner was liable to pay the higher amount provided in the contract, $400,000. It accordingly reversed the judgment directing the District Court to enter judgment for respondents for $100,000, the balance due under the contract, with interest. We granted certiorari, limited to the question whether a new trial should not have been granted, on the assertion that the failure to remand for a new trial deprived petitioner of his day in court in violation of the rule of *Saunders* v. *Shaw*, 244 U. S. 317.

We conclude that the Circuit Court of Appeals committed no error.

The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not *per se* sufficient to cause a remand for a new trial under the rule of *Saunders* v. *Shaw, supra*. The production of the well was tested by the umpire in the manner provided in the contract and the results of that test were without objection admitted at the trial. Complete establishment of the facts necessary for application of the formula was thus made in the manner provided by the parties in their contract. To be sure, petitioner now asserts that on a new trial he would attack the competency and accuracy of the umpire's report—matters which were immaterial to the issues on the trial in view of the fact that it was not contested that no more than 3,000 barrels of oil a day could be produced through a 3/8-inch choke. But the difficulty with peti-

tioner's position is that he has not preserved that point. On his petition for rehearing to the Circuit Court of Appeals, petitioner did not ask that court to allow him a new trial in order to attack the umpire's report.[2] Nor was that the ground upon which the petition for certiorari was predicated. For review by this Court was sought and granted on the ground that the Circuit Court of Appeals had decided the merits on facts not contained in the record and on a theory which had never been tried by the litigants. There was no intimation in the petition for certiorari that a new trial should be granted in order to afford petitioner an opportunity to attack the competency and accuracy of the umpire's report. It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner. *Clark* v. *Williard*, 294 U. S. 211, 216; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498; *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S 142, 146. Accordingly, petitioner cannot now complain that he has not had his day in court and has been deprived of due process of law contrary to the ~~Fourteenth~~ Fifth Amendment. Due process of law is not concerned with mere afterthoughts.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[2] In addition to attacking the interpretation of the contract by the Circuit Court of Appeals, petitioner merely asserted, "Your Honors have erred in predicating your opinion upon facts not contained in the record and upon facts which are disproved by the record."